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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RONALD SCOTT DINGWALL, Defendant and Appellant.	A153299 (Sonoma County Super. Ct. No. SCR681255)

Appellant Ronald Scott Dingwall was convicted of committing a lewd and lascivious act upon John Doe, a child under 14 years of age (Pen. Code, § 288, subd. (a))[1] (count 1), and a lewd and lascivious act on the same child by force (§ 288, subd. (b)(1)) (count 2). As to both counts the jury found true the allegation that appellant had substantial sexual conduct with Doe. (§ 1203.66, subd. (a)(8).)[2]

Appellant does not challenge his conviction of the offense charged by count 2; his sole claim is that his conviction of the offense charged in count 1 must be reversed because the trial court's instruction that the People were not required to prove a "motive" for the offense improperly relieved the prosecution of the burden of proving that he touched Doe with "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child." (CALCRIM No. 1110.)

Rejecting this claim, we shall affirm the judgment.

[1] All statutory references are to the Penal Code.

[2] The jury acquitted appellant of a third count, committing a lewd and lascivious act upon Doe on a different date than he committed the offenses charged in counts 1 and 2.

FACTS[3]

Appellant and Martha R. never married but had a romantic relationship during the mid-1990's and a daughter, N. N. lived with Martha in Petaluma until she was 13 and then moved in with appellant and his parents in Mill Valley. After Martha and appellant broke up, Martha had three more children who were not fathered by appellant: John Doe, and two daughters. Although appellant and Martha did not often communicate when N. was young, as she got older they and Martha's other children engaged in family activities together for N.'s sake and sometimes stayed overnight at each others' homes.

On the evening of May 5, 2016, when John Doe was 10 years old, appellant went to Martha's home to help Doe with his homework. Because the other children were too noisy, they moved from the living room to Doe's bedroom. After working together on the homework, both fell asleep on the bed.

Doe woke Martha up about 7:30 a.m. He was "terribly upset," felt nauseous, and told his mother appellant had "touched him and . . . put his hands in his underwear and masturbated him." According to Martha, Doe said appellant had "shown him porn videos" and described "what puberty was all about [and] what an erection looked like," shown Doe his own penis, and demonstrated "how to masturbate." Appellant "grabbed [Doe's] hand and put [it] on [Doe's] penis and started masturbating him with it." Doe told his mother that at that moment, appellant "was still masturbating in the bedroom and he didn't want to go back in there." Martha then went to Doe's bedroom, saw appellant's underwear on the floor, and told him he needed to leave, which he did.

The next day, Martha took John Doe to the Petaluma police station, where he was initially interviewed by Officer John Antonio. Doe told Antonio that a family friend named Scott (appellant's middle name, which he commonly uses), his sister's dad, had slept over the previous night and Doe told him he was then going through puberty. The two talked about that for a while and then fell asleep. When they woke up in the morning, appellant started rubbing John Doe's penis through his pajama pants. John Doe

[3] The facts related are only those pertinent to the single legal question presented.

was "scared" and "nervous" as this was happening and asked appellant to stop, but then appellant "opened up his [Doe's] pajama pants, put his hand on John Doe's bare penis, and began rubbing it." Afterward, appellant "pulled his own pajama pants down and began rubbing his own penis" which was "long and hard." Appellant then grabbed John Doe's hand and placed it on John Doe's penis and continued to rub his own penis for about 15 or 20 minutes until "white stuff came out of the tip or out of the penis."

Erin Moilanen, a forensic sexual assault examiner who examined John Doe was told by Doe that appellant "touched my pee pee. He moved it up and down and right and left, told me about puberty. He grabbed my hand and made me touch his pee pee," and "white stuff came out of it," after which "I barfed."

Petaluma Police Officer Joel Stemmer, who also interviewed Martha and John Doe, testified that around 10:00 p.m. on May 6, Martha agreed to make a pretext telephone call to appellant that would be monitored by Stemmer. A transcript of the phone discussion between Martha and appellant was received in evidence and provided the jury. During the call appellant denied deliberately touching John Doe's penis but allowed that he may have done so inadvertently, as "maybe we were wrestling or something." After John Doe asked him "about the birds and the bees," appellant said he engaged in "a birds and bees talk with him." When Martha asked for his side of the story, appellant said he had an erection, stating "that's morning wood. You know, we get that sometimes." Appellant admitted he showed Doe depictions of genitals, which he described as "clinical crap," including pictures of an erect penis. Appellant denied he made John Doe touch his penis, but said Doe may have been "touching me in my sleep."

Officer Stemmer interviewed appellant early the following day, telling him that he had listened to his discussion with Martha during the recorded phone conversation. Appellant's statements to Stemmer were much the same as those he made to Martha on the phone. He said he woke up that morning with an erection and when John Doe asked him about it, he told him erections are something that happens when a boy reaches "puberty." He did not make John Doe touch his or Doe's own penis, but Doe may have "brushed" against it.

THE ISSUE PRESENTED

Section 288, subdivision (a), the offense charged in count 1, provides, as material, that "a person who willfully and lewdly commits any lewd or lascivious act . . . upon . . . a child who is under the age of 14 years, with the *intent* of arousing, appealing to, or gratifying that lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." (Italics added.)[4]

The centrality of the question whether appellant harbored the requisite intent was emphasized by the prosecutor in his closing argument. As he told jurors, the necessary touching "has to have been committed with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child. So [there] has to be a sexual intent with the touching. And that's why the penis, as opposed to something like the foot or hand, becomes a lot more obvious. Because . . . unless you're teaching a young child to pee in a toilet or changing a diaper at that age, there really is no other reason that [appellant] would be rubbing a 10 year old's genitals. It is for sexual intent." Because the evidence appellant touched John Doe's penis was strong and not vigorously contested, the key question was the intent, if any, embodied in the act.

The legal issue appellant presents is whether there is a significant difference between a defendant's motive to commit the offense charged in this case and his or her intent to do so. Claiming there is no such difference, appellant claims that instructing the jury with CALCRIM No. 370—which states that "[t]he People are not required to prove that the defendant had a *motive* to commit any of the crimes charged"[5]—impermissibly

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[4] The instructions for count 1 required the People to prove beyond a reasonable doubt that one, "the defendant willfully touched any part of a child's body under bare skin or through the clothing; or . . . the defendant willfully caused a child to touch his own body, the defendant's body, or the body of someone else either on the bare skin or through the clothing; two, the defendant *committed the act* with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and three, that the child was under the age of 14 years at the time of the act." (Italics added.)

[5] CALCRIM No. 370 goes on to tell the jury that "[i]n reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may

relieved the People of the burden of proving beyond a reasonable doubt that appellant possessed the *intent* necessary to convict him of the charged offense.

DISCUSSION

Standard of Review

As the parties agree, the "de novo standard of review is applicable in assessing whether instructions correctly state the law. [Citation.]" (*People v. Posey* (2004) 32 Cal.4th 193, 218.) " ' "The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 248.) If there is a "reasonable likelihood" the jury understood the instructions in a manner to allow conviction based on proof less than beyond a reasonable doubt, the due process clause of the Fourteenth Amendment is violated. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

Analysis

In his opening brief appellant acknowledges that the argument he expected the Attorney General to advance—"that telling the jury the state did not have to prove 'motive' for the offense would not have undercut the state's obligation to prove 'intent' "—is "entirely sound" in certain conventional contexts. For example, appellant says, "in order to convict of murder, it is necessary for the State to prove an intent to kill"; but, "[i]n no sense could a jury reasonably confuse this intent requirement with the motive for the killing." (Citing *People v. Cash* (2002) 28 Cal.4th 703, 738–739; *People v. Hillhouse* (2002) 27 Cal.4th 469, 504 (*Hillhouse*).) But appellant insists that in the different situation presented in this case a juror *could* reasonably confuse motive and intent and have applied the motive instruction to the intent element of the charged offense.

Emphasizing that due process requires the state to prove to a jury each element of an offense beyond a reasonable doubt, appellant maintains that due process is denied if

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be a factor tending to show the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

"there is a reasonable likelihood the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt, citing *Victor v. Nebraska*, *supra,* 511 U.S. at pages 6, 22. As an example of an assertedly relevant context in which this problem may arise, appellant points to murder cases in which the death penalty is sought based on the special circumstance that the murder was intentional and carried out for financial gain. (§ 190.2, subd. (a)(1).) Appellant maintains that, although this intent is the element of the offense the prosecution must prove, the Supreme Court has in effect recognized in these cases "that where an intent element requires the jury to find the reason a defendant performs an act, intent and motive are one and the same. In other words, a defendant's motive to gain financially from a murder is no different from an intent to do so." For this proposition, appellant cites *People v. Carasi* (2008) 44 Cal.4th 1263, 1308–1309; *People v. State*n (2000) 24 Cal.4th 434, 461; and *People v. Edelbacher* (1989) 47 Cal.3d 983, 1026.

Appellant contends that "[t]he sexual offense here is analogous to the financial gain special circumstance in one key respect. There is a specific intent element that requires the jury to determine 'the reason a person chooses to commit a crime.' "

The murder for financial gain cases appellant relies upon do not pertain to instructional error nor do they establish an equivalence between intent and motive; they relate instead to the sufficiency of the evidence of financial gain. *People v. Carasi*, *supra,* 44 Cal.4th 1263 does state that "[s]ection 190.2 subdivision (a)(1) applies to murders *motivated* by financial gain" (*id.* at p. 1308, italics added), but the opinion makes clear that, as in *People v. Staten, supra,* 24 Cal.4th 434, and *People v. Edelbacher*, *supra*, 47 Cal.3d 983, and most of the murder for financial gain cases, the central question was whether the evidence was sufficient to permit the jury to infer beyond a reasonable doubt that the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain and murdered his victim for that reason. (*Carasi*, at p. 1309 and cases there cited.)

The murder for financial gain special circumstance cases do not usefully relate to the alleged instructional issue in this case. As we shall explain, unlike those cases, the

jury in this case was not required to determine the reason appellant chose to commit the offense.

The Supreme Court opinion most salient to the issue in this case is *Hillhouse*. In that case, the trial court instructed on the mental state required for the various charges, "including that murder requires malice or a killing during the commission of robbery or a kidnapping 'for the purpose of robbery,' that robbery requires the 'specific intent permanently to deprive [the] person of the property,' that the force or intimidation required for robbery 'must be motivated by the intent to steal,' that kidnapping for robbery requires the 'specific intent to commit robbery,' which must exist when the movement commenced, that kidnapping for robbery requires the 'purpose' of robbing, and that the special circumstances of robbery murder and kidnapping murder include the requirements of robbery and kidnapping for robbery." (*Hillhouse, supra*, 27 Cal.4th at p. 503.)

The court instructed the jury with CALJIC No. 2.51, which is comparable to CALCRIM No. 370, the instruction given in this case. The CALJIC instruction tells jurors that the People are not required to prove that the defendant had a *motive* to commit any of the crimes charged, and that " '[m]otive is not an element of the crime charged and need not be shown.' " (*Hillhouse, supra*, 27 Cal.4th at p. 503.)

Like appellant, the defendant in *Hillhouse* argued that telling the jury motive was not an element of the crimes was erroneous. The Supreme Court disagreed, stating that " '[m]otive, intent, and malice—contrary to appellant's assumption—are separate and disparate mental states. The words are not synonyms. Their separate definitions were accurate and appropriate.' [Citation.] Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*Hillhouse, supra*, 27 Cal.4th at p. 504.)

The *Hillhouse* court also distinguished *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*), which appellant relies heavily upon here. In *Maurer*, in which the defendant was convicted of misdemeanor child annoyance under section 647.6, the trial court was found to have erred in giving CALJIC No. 2.51 (the same instruction at issue in

Hillhouse) under its different facts. As pointed out in *Hillhouse*, the appellate court in *Maurer* "found that, although motive is not generally an element of a criminal offense, 'the offense of section 647.6 is a strange beast,' and it *did* have a motive as an element—an unnatural or abnormal sexual interest. [Citation.] Thus the court found the instructions contradictory, and thereby erroneous." (*Hillhouse, supra,* 27 Cal.4th at p. 504.) *Maurer* was distinguishable, the *Hillhouse* court explained, because "[h]ere, although malice and intent or purpose to steal were elements of the offenses, motive was not." (*Ibid*.)

Nor is motive an element of the offense with which we are here concerned. In *Maurer*, the instruction that motive was not an element of the offense was deemed reversible error only because it conflicted with the statute defining the offense, which said the opposite. There was no such conflict in *Hillhouse* and there is none in this case either.

Appellant sees it differently. *Maurer s*hould be controlling, he says, because, as a practical matter there is no genuine "difference between the motivation of an unnatural or abnormal sexual interest in a child and a specific intent to commit a lewd act—an act 'with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.' (§ 288, subd. (a).)—on a child. One who intends to commit such an act is motivated by an unnatural or abnormal sexual interest in the child. Indeed, the state never introduced evidence of any other possible motivation for [appellant] to commit sexual acts on Doe. Without such evidence, the instruction was entirely irrelevant to the case, but worse, because the jury would quite reasonably conclude that it applied to all the charges (or it would not have been given), there is a reasonabl[e] likelihood the jury applied the motive instruction in determining the so-called 'intent element.' "

Appellant ignores not just the distinctly different meanings of "motive" and "intent" but the unusual textual factor distinguishing the offense in *Maurer* from those in this case and *Hillhouse*. Subdivision (a)(1) of section 647.6 defines the offense of annoying or molesting a child under 18 years of age. But subdivision (2) of that statute,

the provision at issue in *Maurer*, relates to annoying or molesting an adult the offender erroneously believes is a child. Subdivision (2), which never uses the word "intent," states that: "Every person who, motivated by an unnatural or abnormal sexual interest in *children*, engages in conduct *with an adult* whom he or she believes to be a *child* under 18 years of age, which conduct, if directed to a child under 18 years of age, would be a violation of this section, shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail for up to one year, or by both that fine and imprisonment." (§ 647.6, subd. (a)(2), italics added.) The gravamen of the offense in *Maurer* is not the nature of the conduct (which might be lawful if directed at an adult) but the nature of the motivation. This unusual provision was apparently designed to ensure that a person motivated by an unnatural or abnormal sexual interest in children who engages in conduct with an adult whom he or she erroneously believes to be a child under 18 years of age, does not escape punishment due to his fortuitous mistake.

The problem in *Maurer* was that the trial court instructed the jury that to commit the crime the defendant must be both "motivated" by an impermissible sexual interest and that "motive" need not be shown. The Court of Appeal reversed because the conflicting instructions removed the issue of intent from the jury's consideration. As we have said, that problem does not exist in this case.

With respect to count 1, as noted, the jury in this case was instructed as follows: To prove that the defendant is guilty of this crime, the People must prove either that one, "the defendant willfully touched any part of a child's body under bare skin or through the clothing; or . . . the defendant willfully caused a child to touch his own body, the defendant's body, or the body of someone else either on the bare skin or through the clothing; two, the defendant *committed the act* with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and three, that the child was under the age of 14 years at the time of the act." (Italics added.) Unlike in *Maurer*, there is no claim here that the instructions conflicted with one another in any way. Nor does anything in the instructions create a reasonable likelihood that the jury understood the terms "motive" and "intent" to be synonymous.

To be sure, the jury may have inferred from the nature of appellant's conduct that it was motivated by an unnatural or abnormal sexual interest in children, but it did not need to reach that conclusion in order to convict. The reasons appellant "willfully caused" John Doe to touch his own or appellant's body may well have been considered and deemed relevant by the jury, but it does not matter. The jury was neither required to make nor prohibited from making such an inquiry because the reasons or motivation of his conduct are not elements of the charged offense. All the People are required to prove is that, whatever appellant's motivation might have been, he acted intentionally; that is, "willfully."

CONCLUSION

In sum, we cannot accept appellant's contention that a juror in this case could reasonably confuse motive and intent and have applied the motive instruction to the intent element of the charged offense. Because we find there is not a "reasonable likelihood" the jury could have understood the instructions in a manner allowing conviction based on proof less than beyond a reasonable doubt, appellant was not denied the due process of law guaranteed him by the Fourteenth Amendment. (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 6.)

DISPOSITION

Accordingly, the judgment is affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

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